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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: JUL 16 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied, reconsidered on motion, and again denied the employment-based immigrant visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a real estate investment and development business. It seeks to employ the beneficiary permanently in the United States as a financial director pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director determined that the petitioner had failed to demonstrate that the beneficiary qualified for the second preference classification. Specifically, the director determined that it could not be ascertained, based upon the evidence in the record, whether the beneficiary met the educational requirements denoted on the Form ETA 750 or the credentials of the education evaluation advisor. The director also noted that a familial relationship exists between the beneficiary and the petitioner's owners.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 23, 2010 denial, the primary issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

[1] After March 28, 2005, the correct form to apply for alien employment certification is the ETA Form 9089.

Here, the Form ETA 750 was accepted on June 9, 2003. The proffered wage as stated on the Form ETA 750 is $50.05 per hour ($104,104.00 per year). The Form ETA 750 states that the position requires a master's degree in economics or equivalent.

The evidence in the record of proceeding shows that the petitioner is a multi-member limited liability company (LLC).[2] On the Form ETA 750, signed by the beneficiary on June 2, 2003, the beneficiary claimed to have been employed by the petitioner's [redacted]

As a threshold issue, counsel asserts that the petitioner, [redacted]. are both owned by the same shareholders and officers, are the same type of business, and share the same address. Counsel further asserts that the owners dissolved [redacted] Inc. as of December 31, 2005, and continue to operate [redacted] Counsel asserts that, therefore, the financial resources of both business entities should be considered in determining the petitioner's ability to pay the proffered wage since the priority date. The petitioner submitted evidence on appeal that represents the dissolution of [redacted]. and the operations of both [redacted] therefore, evidence of [redacted] financial resources alone will be considered until December 31, 2005, and the financial resources of [redacted] will be considered from January 1, 2006, onward. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

USCIS rejects the idea that a shareholder's assets, including their income, should have been considered in the determination of the ability to pay the proffered wage. USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. As noted above, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530, and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its

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[2] A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election.

shareholders, including real estate values, rental income, or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Therefore, the financial resources of the two business entities will only be considered as noted above. As the DOL authorized the correction of the name of the employer on the Form ETA 750 prior to certification, the AAO need not address whether the record before USCIS establishes a successor-in-interest relationship.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The proffered wage is $104,104.00. The record of proceeding contains copies of Internal Revenue Service (IRS) Forms W-2 that were issued to the beneficiary by [redacted] as shown in the table below:

- In 2003, the [redacted] Form W-2 stated total wages of $45,384.00 (a deficiency of $58,720.00).
- In 2004, the [redacted] Form W-2 stated total wages of $45,384.00 (a deficiency of $58,720.00).
- In 2005, the [redacted] Form W-2 stated total wages of $45,384.00 (a deficiency of $58,720.00).
- In 2006, [redacted] Form W-2 stated total wages of $45,384.00 (a deficiency of $58,720.00).
- In 2007, [redacted] Form W-2 stated total wages of $45,384.00 (a deficiency of $58,720.00).
- In 2008, [redacted] Form W-2 stated total wages of $45,384.00 (a deficiency of $58,720.00).
- In 2009, [redacted] Form W-2 stated total wages of $45,384.00 (a deficiency of $58,720.00).

Therefore, for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009 the petitioner has not established that it paid the beneficiary the full proffered wage.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the designated period, then USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009): *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's tax forms for 2008 are the most recent tax returns available. The proffered wage is $104,104.00. The 1120S[3] tax returns and Forms 1065[4] tax returns demonstrate the net income as shown in the table below:

- In 2003, [redacted] Form 1120S stated net income of $97,699.00.
- In 2004, [redacted] Form 1120S stated net income of $106,405.00.
- In 2005, [redacted] Form 1120S stated net income of $9,484.00.
- In 2006, [redacted] Form 1065 stated net income of $0.00.
- In 2007, [redacted] Form 1065 stated net income of $2,692,393.00.
- In 2008, [redacted] Form 1065 stated net income of -$204,161.00.
- In 2009, the petitioner did not provide a copy of its tax return.

Therefore, for the years 2005, 2006, 2008, and 2009, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown

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[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2002 and 2003) and line 17e (2004 and 2005) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

[4] For an LLC, where an LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where an LLC has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In this matter, the director failed to use the figures on line 1 of the Analysis of Net Income (loss) of the Schedule K.

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within

on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. An LLC's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If the total of a business entity's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax return demonstrates its end-of-year net current assets as shown in the table below.

- In 2005, [redacted] Form 1120S stated net current assets of $0.00.
- In 2006, [redacted] Form 1065 stated net current assets of $14,733,040.00.
- In 2008, [redacted] Form 1065 stated net current assets of -$27,608.00.
- In 2009, the petitioner did not provide a copy of its tax return.

Therefore, for the years 2005, 2008, and 2009, the record shows that the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director's decision is based on an incorrect interpretation of the petitioner's financial records, and that it has provided evidence sufficient to show that it has the ability to pay the proffered wage. Counsel further asserts that USCIS must consider the totality of the circumstances in its determination of the petitioner's ability to pay the proffered wage.

The petitioner infers that as sole owners, the LLCs' member's assets and personal liabilities may be considered in determining the petitioner's ability to pay the proffered wage.

Contrary to the petitioner's claim, the evidence of record (including the petitioner's Forms 1065 tax return) demonstrate that it is a Limited Liability Company (LLC), and it is an elementary rule that an LLC or a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24, *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530, and *Matter of Tessel*, 17 I&N Dec. 631. Furthermore, a petitioner may not make material changes to a petition or evidence in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Consequently, the personal assets or other enterprises or corporations cannot be considered in determining the petitioning LLC's ability to pay the proffered wage. The court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." See *Sitar v. Ashcroft*, 2003 WL 22203713. Therefore, USCIS may not look to the

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one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

assets, including real estate, of the LLC's owners or of other entities to satisfy the LLC's ability to pay the proffered wage.

The petitioner infers that its cash balances should be considered in assessing its ability to pay the proffered wage, and submits a copy of its bank statements. Contrary to the petitioner's claim, reliance on the balances in the petitioner's owner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

On appeal, the petitioner asserts that the beneficiary could have been paid from money used for "outside services." The record does not, however, provide evidence that the petitioner could have replaced the workers with the beneficiary or redirected these funds into the beneficiary's salary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the employees involves the same duties as those set forth in the Form ETA 750. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).[6]

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case,

[6] The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee as is stated here or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The petitioner has not established the existence of any facts paralleling those in *Sonegawa*. The petitioner has not established that the relevant years were uncharacteristically unprofitable years or difficult period for its business.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

A second issue in this case is whether the petitioner has submitted sufficient evidence to demonstrate that the beneficiary qualified for the second preference classification.

The director's decision denying the petition concludes that the beneficiary did not possess a U.S. master's degree or foreign equivalent as required by the terms of the labor certification.

On appeal, counsel asserts that the beneficiary has obtained a master's degree in economics and that such is sufficient to demonstrate his educational classification. On the Form ETA 750B, the beneficiary indicated that he received a master's degree in economics from Verji [sic] Universiteit, Amsterdam, The Netherlands from 1974 through 1979.

The record contains an evaluation from [redacted] for Education Evaluators International, Inc. dated December 9, 1998. The evaluation concludes that based upon documents on file, the beneficiary completed studies in 1979 at Verji [sic] Universiteit (Free University) in the Netherlands, and that the beneficiary completed five years of full-time studies encompassing both undergraduate and graduate level studies. The evaluation further indicates that the beneficiary earned a

Doctorandus degree from the faculty of economics and that his studies are the equivalent, in level and purpose, to a masters of arts degree in economics awarded by a regionally accredited college or university in the United States.

The record also contains an evaluation from [redacted], dated April 22, 2010. The evaluation concludes that the beneficiary's credentials, studies in the Netherlands at the Free Reformed University of Amsterdam resulting in the passage of the Doctoraal Examen (Doctoral Examination) in 1979, indicate that he has achieved the equivalent of a master's degree.

Contrary to the evaluations, the beneficiary's degree from the Netherlands does not indicate that it is a master's degree in economics. The record of proceeding contains an English translation of the beneficiary's degree which indicates that the beneficiary did receive a degree from the faculty of economics of the Free Reformed University in February 1979 but that the degree was not named. Therefore, there is no evidence in the record to demonstrate that the beneficiary received a master's degree in economics or its foreign equivalent prior to the priority date in the instant case.

The beneficiary does not have a "United States master's degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. For this additional reason, the petition may not be approved.

A final issue to be addressed is whether the petition was based on a bona fide job offer and whether a pre-existing familial relationship may have affected the labor certification process.

The director issued a Notice of Intent to Deny (NOID) in which he noted that the beneficiary and two of the petitioner's owners share the same last name. In response to the NOID, counsel indicated that although a familial relationship exists between the petitioner's owners and the beneficiary, the beneficiary does not have any investment or interest in the petitioner or its predecessor. The petitioner further indicated that the Form ETA 750 was prepared and filed in accordance to the requirements of the DOL.

In the decision, the director indicated that because the beneficiary of the instant petition has a familial relationship with the petitioner's owners, USCIS could not accept the statement made by the petitioner on the labor certification that the job opportunity was and is open to any qualified U.S. worker. The director inferred that the familial relationship of the petitioner to the beneficiary invalidates the bona fide job offer to qualified U.S. workers upon which the petition is based and determined that this issue was another reason for denying the petition.

On appeal, counsel reiterates the statements made in response to the NOID.

Upon review of the record, the AAO agrees that the record does not establish that the job offer was bona fide and open to all U.S. workers. Fundamentally, the job offer must be "clearly open to any qualified U.S. worker." It is noted that a relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by "blood" or it may be "financial, by marriage, or

through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

In this matter, the petitioner admits that a familial relationship exists between its owners and the beneficiary. Although the petitioner claims that the beneficiary does not have a financial interest in the enterprise, the petitioner has submitted no evidence to substantiate its claim that the job offer was bona fide. To the contrary, it is more likely than not that the job was not open to all qualified U.S. workers and that it was open only to the beneficiary, a family member of the petitioner's owners.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.